

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

74-2062

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

INTERSTATE COMMERCE COMMISSION,)
Plaintiff-Appellee.)

and)

ETHAN ALLEN, INC., VERMONT PUBLIC)
SERVICE BOARD and NEW HAMPSHIRE)
PUBLIC UTILITIES COMMISSION,)
Intervenors)

NO. 74-2062

vs.)

MAINE CENTRAL RAILROAD COMPANY,)
Defendant-Appellant.)

On Appeal From The United States District Court
For The District of Vermont

BRIEF OF INTERVENORS-APPELLEES
VERMONT PUBLIC SERVICE BOARD AND
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION



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September 20, 1974

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STATEMENT OF THE CASE

This case involves the indefinite cessation of service by a railroad which had received damage by flood to its right-of-way but which had received no authority to abandon from the Interstate Commerce Commission.

The Interstate Commerce Commission commenced this action by filing a Complaint in the United States District Court for the District of Vermont, on March 20, 1974, seeking injunctive relief against the appellant, Maine Central Railroad to restrain it from the alleged abandonment of a 23 mile segment of its line from North Stratford, New Hampshire to Beecher Falls, Vermont. The Public Service Board of the State of Vermont, Ethan Allen, Inc. and the New Hampshire Public Utilities Commission were allowed to intervene. Hearings were held in Burlington, Vermont on May 21, May 22 and June 7, 1974.

On July 18, 1974, the District Court issued its Opinion and Order requiring that the railroad immediately proceed to restore rail service to the level rendered prior to the flood and that \$52,000.00, to be contributed to the railroad by the shipper, Ethan Allen, Inc., be applied to the cost of repairing the flood damage. (Op. 14.) (We note that the appellant's description of the District Court's Order in its Brief and in its Memorandum of Law filed with its Motion For Stay of the Order avoids mention of that part of the Order referring to the

shipper's contribution.)

Motions by the railroad for stay of the District Court's Order were denied after hearings by the District Court on August 8, 1974, and by this Court on September 10, 1974. It was further ordered by this Court that the appellate process be expedited.

STATEMENT OF FACTS

For many decades prior to the incident giving rise to this action the Maine Central Railroad Company had operated a line of railroad over 57 miles long from Quebec Junction, New Hampshire to Beecher Falls, Vermont. (Tr.243.) The line is divided into 4 segments from south to north as follows:

Quebec Junction, New Hampshire to Lancaster, New Hampshire (Coos Junction);
Lancaster, New Hampshire to Groveton, New Hampshire;
Groveton, New Hampshire to North Stratford, New Hampshire; and
North Stratford, New Hampshire to Beecher Falls, Vermont. (Defendant's Exhibit B, page 2.)

The first and southern most segment between Quebec Junction, New Hampshire and Lancaster, New Hampshire (also called Coos Junction) is owned by the Maine Central Railroad and both the Boston and Maine Railroad and the Maine Central Railroad operate over it, the Boston and Maine operating under a trackage agreement according to which it had an option to purchase in the event the

the Maine Central should abandon operations. (Tr. 239.)

The second segment from Lancaster, New Hampshire to Groveton, New Hampshire is owned by the Boston and Maine Railroad. Both the Boston and Maine Railroad and the Maine Central Railroad operate over it.

The third segment from Groveton, New Hampshire to North Stratford, New Hampshire is owned by the Canadian National. Both the Canadian National and the Maine Central operate over that segment, the latter operating under agreement with the Canadian National.

The fourth and northern most segment, North Stratford, New Hampshire to Beecher Falls, Vermont is owned by the Maine Central Railroad Company. The Maine Central was the only railroad operating over that segment of the line. That segment is about 22 miles long and is the subject matter of this case.

On June 27, 1974 the Board of Directors of the Maine Central Railroad voted to abandon the Beecher Falls Branch after its President learned that a major shipper on the branch, St. Regis Paper Company, was about to terminate operations. (Tr. 173-174.)

On June 29 and 30 and July 1, 1973, flooding occurred in

northern Vermont and New Hampshire causing substantial damage to the northern most segment of the line between North Stratford, New Hampshire and Beecher Falls, Vermont. (Tr. 247.) The railroad issued an embargo relating to that northern most segment of the line on July 3, 1973. (Tr. 181.) On July 19, 1973, the railroad filed its Application For Abandonment in Interstate Commerce Commission Finance Docket No. AB-83. (Tr. 175, Defendant's Exhibit B.) The Application For Abandonment (Defendant's Exhibit B) distinguished the concept of "abandonment of the line" from the concept of "abandonment of operations". "Abandonment of the line" was sought with respect to the two segments owned by Maine Central from Quebec Junction to Lancaster, the southern most segment and from North Stratford to Beecher Falls, the northern most segment. "Abandonment of operations" was sought over the middle two segments which were owned by the Boston and Maine and the Canadian National, respectively. (Defendant's Exhibit B, page 4.) Because the Boston and Maine had an option to purchase the southern most segment from Quebec Junction to Lancaster and could thereby continue operations there and because the two middle segments were owned and operated over by the Canadian National and the Boston and Maine, the only segment which would receive no rail service whatsoever if the application to the Interstate Commerce Commission were successful was the northern most segment from North Stratford to Beecher Falls. (Tr. 240, 245.) It was that segment which

was damaged; it was that segment which was embargoed; it was that segment over which service ceased to be rendered; and it was that segment with respect to which the Interstate Commerce Commission brought this action. (The Maine Central Railroad strains to make the whole 57 miles the subject matter of the controversy for the sake of applying an Interstate Commerce Commission rule-of-thumb to this proceeding.¹)

Between the time of the flood of July 1, 1973, and the issuance of the District Court's Order of July 18, 1974, no effort was made by the railroad to repair the flood damage and no service was performed over the segment from North Stratford to Beecher Falls. (Tr. 197.)

In its Application For Abandonment to the Interstate Commerce Commission the railroad originally estimated the cost of repairing the damage caused by the flood to be \$30,000.00. (Defendant's Exhibit B, page 8.) This figure was revised by the time of the hearings before the District Court to the sum of \$52,000.00. (Tr. 198, 261.) The difference being attributable to "accounting burdens" i.e. general overhead items including vacations, holidays, retirement, law department expenses, accounting expenses, purchase and store expenses and other overhead items. (Tr. 301.) A portion of general railroad overhead were added expenses to the estimate of the cost of repairing the

1. Reference is to Fn. 5, page 7. Appellant's Brief. The President of the railroad, an experienced lawyer, recognized that the 34 car rule-of-thumb could not be applied to the instant case for other reasons. (Tr. 175.) A twelve month showing is required by 49 CFR 1121.21(d).

line for accounting purposes although little out-of-pocket savings in such areas could be derived from not having made these repairs. (Tr. 303, 304.) There was conflicting testimony as to whether or not the shipper, Ethan Allen, Inc., had in January 1974, conveyed an offer to the railroad to pay the sum of \$30,000.00, the original estimate of the cost of repairs. (Tr. 199, 334.) In any event, the offer to pay \$52,000.00 was made in open Court at the hearings (Tr. 207) and incorporated into the Order of the District Court. (Op. 14.)

Ethan Allen, Inc., the principal shipper on the Beecher Falls Branch, is a manufacturer of furniture with a plant at Beecher Falls, Vermont, employing 640 people. It pays taxes to the Town of Beecher Falls in the area of \$100,000.00 per year. (Tr. 71.) It depends upon rail service for the efficient movement of its products to market. Its plant was particularly designed for shipment by rail. (Tr. 72.) Its growth from 350 employees in 1968 has been attributed to railroad service and cooperation. (Tr. 72.) Shipments by motor carrier are extremely inefficient and increase transportation costs tremendously. (Tr. 74.) Ethan Allen's President testified that the lack of rail service made it impractical to consider any further expansion of its production at Beecher Falls. (Tr. 106.) The sincerity of his claim to be suffering financial hardship is evidenced by his offer to pay for the flood damage.

The financial statements attached as Exhibits B-C to the railroad application seeking authority to abandon (Defendant's Exhibit B) make clear the railroad's financial ability to restore the line for service.

STATEMENT OF ISSUES

This appeal raises the following issues:

1. Whether the indefinite suspension of service by a profitable railroad for over 10 months following flood damage without any effort to repair the damage and restore the service and without any authority to do so from the Interstate Commerce Commission constitutes an "abandonment" under Section 1(18) and 1(20), which may be enjoined by a Federal District Court.

2. Whether there was any abuse of discretion by the District Court in issuing its Order requiring the repair of the damage and restoration of service by the railroad given that the Order also required the shipper serviced by the line to bear the cost of repairs caused by the flood damage.

ARGUMENT

From the foregoing facts and a review of applicable law the

following conclusions appear beyond serious dispute:

1. The Interstate Commerce Act requires the approval of the Interstate Commerce Commission prior to abandonment. Interstate Commerce Act, 49 U.S.C. Section 18¹.

2. The June 27, 1973 vote of the Board of Directors of the Maine Central Railroad to seek authority to abandon the line, the cessation of service following the flood of June 29, 30 and July 1, 1973, the filing of the Petition for abandonment with the Interstate Commerce Commission on July 19, 1973 and the passage of a year without service or any attempt to restore the line when restoration is well within the capability of the railroad, taken together, constitute abandonment within the meaning of 49 U.S.C. Section 1(18). Myers v. Jay Street Connecting R.R., 259 F. 2d 532 (2d Cir. 1958). Commonwealth of Pennsylvania v. Penn Central Transportation Co. 348 F. Supp. 28, 30 (M.D. Pa. 1972).

3. Since the I. C. C. has not sanctioned the abandonment, it is in violation of 49 U.S.C. Section 1(18) and the

District Court had the power to enjoin the violation. 49 U.S.C.,

1. Section 1(18) of the Interstate Commerce Act, 49 U.S.C., provides as follows: "No carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment".

Section 1(20)² Commonwealth of Pennsylvania v. Penn Central Transportation Co., supra. Powell v. United States, 300 U.S. 276, 287 (1937), Interstate Commerce Commission v. Chicago, Rock Island and Pacific Railroad Company, No. 73-1920 (8th Cir. July 24, 1974).

The only matter on which there may be reasonable dispute is "whether it is equitable to permit the railroad to continue suspension of service until the Interstate Commerce Commission decides whether permanent abandonment is appropriate". Commonwealth of Pennsylvania v. Penn Central Transportation Company, supra at page 30. The hearing in the District Court for over two days revolved largely around this issue. On appeal in such a case" ordinarily the reviewing court applies the principle that the grant or denial of an injunction will be reviewed only to determine whether there has been an abuse of discretion". Interstate Commerce Commission v. Chicago, Rock Island and Pacific Railroad Company, supra, at page 10.

The District Court weighed the equities noting that here we have a major shipper who heavily relied on the continuation of rail

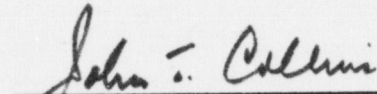
2. Under Section 1(20) of the Act 49 U.S.C. Section 1(20), any abandonment contrary to the provisions of Section 1(18) "may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest".

service in planning, building and operating its plant; that the interruption of rail service created a serious hardship for the shipper; that the railroad was profitable and fully capable of making the repairs and that the shipper had offered to pay for the repairs necessitated by the flood damage. (Op. 13, 14.) The District Court's Order contemplates a further order requiring the shipper to make good on this offer, leaving the railroad to pay only for the results of its own heal-dragging. (Op. 14.)

CONCLUSION

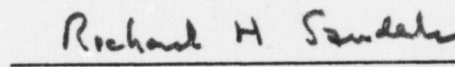
A reading of the Opinion and Order of the District Court makes clear that it gave due consideration to the equities and weighed them fairly. There is a strong congressional policy and substantial public interest in not permitting abandonment of railroad services without the approval of the I. C. C. in the light of which the District Court's exercise of discretion should be judged. Interstate Commerce Commission v. Chicago, Rock Island and Pacific Railroad Company, supra at page 10, Myers v. Jay Street Connecting R. R., supra at 536. So considered, it should be found that there was no abuse of discretion by the District Court and its Order should be affirmed.

Respectfully Submitted



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CERTIFICATE OF SERVICE

I hereby certify that I served all parties to this appeal with copies of Brief of Intervenors - Appellees, Vermont Public Service Board and New Hampshire Public Utilities Commission in the following manner:

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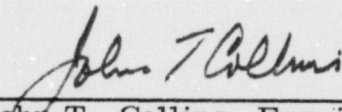
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